Supreme Court, U.S.
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No. 87-813

In The
Supreme Court of the United States
October Term, 1987

CHARLES BRANDT and HENRY BRANDT,
d/b/a BRANDT CONSTRUCTION CO., a partnership,

Petitioner,

vs.

UPTOWN NATIONAL BANK OF MOLINE,
a national banking corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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UPTOWN NATIONAL BANK OF MOLINE,
a national banking corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Respondent, Uptown National Bank of Moline,[1] a national banking corporation, respectfully prays that a writ

[1] Pursuant to Rule 28.1, Respondent states that Uptown National Bank of Moline, a national banking corporation, is a wholly owned subsidiary of the parent corporation, Uptown Bancorporation, Inc. Uptown National Bank of Moline has no subsidiaries nor affiliates.

of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on August 11, 1987, be denied.

—o—

STATEMENT OF THE CASE

All legal proceedings in this case stem from disputes arising during a construction project at the Rock Island Arsenal, a Federal facility. The Petitioner, Brandt Construction Company (hereinafter called Brandt) was the general contractor on the Arsenal project. Uptown National Bank, a banking corporation (hereinafter called Uptown), financed DeVolder Roofing Brothers, a subcontractor of Brandt's on the Arsenal project. Litigation arose from this project when Owens-Corning Fiberglas Corporation (hereinafter called Owens-Corning), one of DeVolder's material suppliers, was not paid. A claim was filed on August 24, 1983 in Case No. 83-4066, pursuant to the Miller Act, 40 U.S.C. Secs. 270a and 270b, in the United States District Court for the Central District of Illinois by Owens-Corning against Brandt for its unpaid bill for materials supplied to DeVolder for use in the Arsenal project.[2]

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[2] The full caption of the suit filed by Owens-Corning is as follows: THE UNITED STATES OF AMERICA for the Use of OWENS-CORNING FIBERGLAS CORPORATION, a corporation, Plaintiff, v. BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt; CHARLES BRANDT, a partner of Brandt Construction Company; HENRY BRANDT, a partner of Brandt Construction Company; and INSURANCE COMPANY OF NORTH AMERICA, Defendants.

Prior to the commencement of the Owens-Corning suit in Federal Court, however, on August 5, 1983, Brandt filed suit against Uptown in the 14th Judicial Circuit, Rock Island County, Illinois, in Case No. 83 L 228. Count II of Brandt's complaint against Uptown pleaded a pure State cause of action. Count I of the complaint pleaded matters relating to the Miller Act, forming the basis on which Uptown petitioned to remove the lawsuit to the United States District Court for the Central District of Illinois.[3]

On September 2, 1983, Uptown filed a petition to remove Brandt's State Court claim under the theory that Count I appeared to be requesting that the Court impose liability on Uptown pursuant to the Miller Act. Uptown also filed a motion to dismiss Brandt's claim. On September 16, 1983, Brandt filed a motion to invoke ancillary jurisdiction and to consolidate.[4] Neither the motion to invoke ancillary jurisdiction, nor the order entered November 2, 1983[5] granting the motion, however, was based upon Rule 14(a) of the Rules of Civil Procedure 14a regarding third party actions.

The Order of November 2, 1983, granting the motion to invoke ancillary jurisdiction and to consolidate, also granted Uptown's motion to dismiss for failure to state a cause of action. Brandt thereafter filed an amended

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[3] A copy of Count I of the original Brandt complaint filed in State Court, thereafter removed on petition of Uptown to the United States District Court for the Central District of Illinois is included on Respondent's Appendix (hereinafter referred to as R.A.) on App. 1.

[4] See Petitioner's Appendix (hereinafter referred to as P.A.) A-28.

[5] See Docket Order in P.A. A-16.

complaint.[6] After the original Owens-Corning v. Brandt case (No. 83-4066) and the Brandt v. Uptown case (No. 83-4073) were consolidated, pursuant to the Court's Order of November 2, 1983, summary judgment was entered on April 3, 1984 for Owens-Corning and against Brandt as to Owens-Corning's Miller Act claim against Brandt.[7] No appeal was taken from that decision.

On October 23, 1984, the Court ruled on cross-motions of the parties for summary judgment as to Count I of the Amended Complaint.[8] The Court granted summary judgment in favor of Uptown and against Brandt as to Brandt's first cause of action relating to the apparent Miller Act claim against Uptown and denied Brandt's motion.[9] Thereafter trial was held resulting in a verdict in favor of Brandt and against Uptown as to compensatory and punitive damages. After a remittitur of the punitive damages, which was rejected by Brandt, a second trial was conducted on the restricted issue of punitive damages only with a second verdict in favor of Brandt. Uptown appealed and Brandt cross-appealed the District Court's Order granting of the summary judgment as to Count I of the Amended Complaint in favor of Uptown and against Brandt.

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[6] A reproduction of Count I relating to the apparent attempts of Brandt to impose Miller Act liability on Uptown is in R.A. App. 3. Count II of the amended complaint undisputedly plead a non-Federal cause of action.

[7] A reproduction of the Judgment Order entered on April 3, 1984 is included in R.A. App. 10.

[8] A reproduction of Petitioner's motion for summary judgment regarding Count I of the amended complaint is in R.A. App. 6.

[9] A copy of District Court Judge Mihm's Opinion on motion for summary judgment is included in P.A. A-10 - A-15.

During oral arguments on Uptown's appeal and Brandt's cross-appeal, the Court of Appeals for the 7th Circuit raised, sua sponte, the jurisdictional question. After supplemental briefs were submitted by both parties, restricted to the jurisdictional question, the Court of Appeals for the 7th Circuit entered the present order with directions to the District Court to remand the case to State Court because of a want of Federal jurisdiction.[10]

———o———

SUMMARY OF ARGUMENT

The improper proceeding by which Brandt's claim was removed from State Court to Federal Court failed to vest Federal jurisdiction over said claim. Brandt's motion to invoke ancillary jurisdiction and to consolidate with a pending Federal claim did not create Federal jurisdiction otherwise lacking over Brandt's removed State claim.

———o———

[10] The Opinion of the United States Court of Appeals for the Seventh Circuit, rendered August 11, 1987, is reproduced in the P.A. A-1 - A-9.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I

THE SEVENTH CIRCUIT, PROPERLY AND CONSISTENTLY WITH HOLDINGS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS, RULED THAT BRANDT'S MOTION TO INVOKE ANCILLARY JURISDICTION AND TO CONSOLIDATE DID NOT FORM AN INDEPENDENT BASIS OF JURISDICTION EXCLUSIVE OF THE DEFENDANT'S REMOVAL PETITION.

The Petitioner incorrectly asserts that the Appellate Court decision violated well established principles regarding ancillary and third party claims. The Petitioner has failed to show that the decision of the 7th District is inconsistent with the decisions of any other Federal Court of Appeals or that the question decided by the 7th Circuit Court of Appeals is of such an important nature that it presents a Federal question of such importance that it should now be decided by this Court. Pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 1139 (1966), the Federal Court can only exercise jurisdiction over a state claim if it appends to a Federal question. In this case, as noted by the Appellate Court in its decision, neither Count I, nor Count II of the Petitioner's complaint, originally filed in State Court, formed a basis on which Federal jurisdiction could be founded.

While the effects of defects in the removal proceedings have been lessened by this Court's ruling in *Grubbs v. General Electric Corp.*, 405 U.S. 699, 92 S.Ct. 1344 (1972), the party asserting Federal jurisdiction must still, at the very least, demonstrate the existence of a Federal

claim over which the Federal Court could have exercised jurisdiction. *Grubbs, supra.* If this can be demonstrated, the court may exercise jurisdiction over an improperly removed Federal question and ancillary or pendent state claims. In this case the improper removal proceeding in effect brought nothing from the State Court and, therefore, provided no Federal question on which Federal jurisdiction could be vested.

In support of his argument in Section I, Petitioner relies on *Rieser v. District of Columbia,* 580 F.2d 647 (D.C. Cir. 1978). *Rieser,* however, presented a factual situation unique to the District of Columbia, since it arose during a period of reorganization of that court system. Additionally, in *Rieser,* unlike this case, all of the claims, counterclaims and third party complaint were originally and properly filed in the Federal Court. *Rieser,* therefore, is not dispositive of the question raised by the Petitioner regarding whether the Petitioner's motion to invoke ancillary jurisdiction and to consolidate vested the Federal Court with jurisdiction over an improperly removed State Court claim regarding which no other basis for Federal jurisdiction exists. Clearly, despite Brandt's characterization of his State Court claim against Uptown as being in the nature of a third party action, that case was in fact a separate claim filed in a separate court and even preceding the filing of the Owens-Corning Miller Act claim against Brandt by several weeks. Brandt in his State Court claim sought, in essence, to impose liability on Uptown for monies Brandt claimed he would owe Owens-Corning under the Miller Act *before* (emphasis added) any action was commenced by Owens-Corning in Federal

Court. While Brandt now professes to favor avoiding the burden of expensive piecemeal litigation, it hardly seemed to have been a priority when this case began. Though he maintains that he could have filed a third party complaint against Uptown in the Owens-Corning case, pursuant to Federal Rules of Civil Procedure 14a, he did not. For whatever reason, he elected to file in State Court even before Owens-Corning filed its claim against Brandt in Federal Court. Subsequently, when Uptown petitioned to remove the State Court claim to Federal Court, though Brandt now asserts that he could have filed a third party complaint against Uptown, pursuant to Rule 14a, he did not. Instead, he elected to ask the Court to invoke ancillary jurisdiction and to consolidate Brandt's State court claim with the then pending Owens-Corning v. Brandt Federal Court case.

The effectiveness of Petitioner's efforts to invoke Federal jurisdiction over his claims originally filed in State Court, which he did not by leave to bring in a third party pursuant to Rule 14 of the Rules of Civil Procedure but rather pursuant to Rule 42(a), has been addressed by the Appellate Court. Since Rule 42 (Fed. Rules Civ. Proc. Rule 42(a), 28 U.S.C.) requires that matters be pending before the Court (and Brandt's State Court claims were not pending before the Court) before such matter may be consolidated and heard with any other claim pending before the Court (in this case the Owens-Corning v. Brandt claim), the Appellate Court properly concluded that, under the doctrine as set forth in *Grubbs* and applied to the facts in this case, Federal jurisdiction was lacking.

Petitioner now maintains that his original causes of action filed in State Court were pure State claims, with Count I having not been brought pursuant to the Miller Act. This position is inconsistent with the position taken in his Brief filed in the 7th Circuit. In Section VI of that Brief, entitled "THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF THE AMENDED COMPLAINT", the Petitioner still appears to be asserting a claim against the Respondent under the Miller Act. On page 30 of the Brief the Petitioner stated: "The theory set forth in Count I of the Amended Complaint was based on cases establishing that a creditor has a duty to apply funds from a government, bonded job to obligations incurred in generating those funds. The courts, in dealing with cases arising under the Miller Act (40 U.S.C., Sec. 270b), have made it clear that a creditor who knows that funds are derived from such a bonded job is obligated to apply said amount to that account as opposed to an unrelated transaction. Since it is undisputed that Uptown knew that the funds which it appropriated were derived from the Arsenal project and that there were unpaid suppliers pertaining to that matter, Brandt filed a Motion for Summary Judgment as to this count of the Complaint. Uptown filed a cross motion. Brandt's motion was denied and the motion of Uptown was granted."

It would appear, therefore, that until the issue of jurisdiction was raised in the Appellate Court the Petitioner, despite his efforts to call Count I of the Complaint a derivative action, was still attempting to assert what, in effect, constituted a Miller Act claim against Respondent. The Appellate Court concluded that Count I did not

state a cause of action pursuant to the Miller Act, but rather stated a State Court cause of action only. In either event, unlike *Rieser*, Federal jurisdiction, which cannot attach to Brandt's claim originally filed in State Court, cannot then be created, after the fact, by a motion to invoke ancillary jurisdiction and to consolidate.

II

THE SEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT IN THIS CASE FOLLOWS CONTROLLING PRECEDENTS OF THE SUPREME COURT AND FEDERAL COURTS OF APPEALS REGARDING THE LACK OF FEDERAL ANCILLARY JURISDICTION IN THOSE SITUATIONS WHERE NO FEDERAL QUESTION OR OTHER BASIS FOR FEDERAL JURISDICTION EXISTS.

Pursuant to *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972), the Federal Court may obtain jurisdiction over a cause of action improperly removed from a state court. Where no objection is made to an improper removal, the central question then becomes one of determining whether the Federal Court would have had original jurisdiction.

The Appellate Court in this case considered and disposed of that issue with its analysis that no Federal basis exists on which to assert Federal jurisdiction regardless of the propriety or impropriety of the removal proceeding. See P.A. A-1 through A-9. While the effects of an imprudent removal may be waivable error, the total lack of Federal jurisdiction is not waivable and can and was properly raised by the Court sua sponte. For that very reason, *VanTine v. Elkhart Brass Mfg. Co., Inc.*, 762 F.2d 511 (1985), cited and relied upon by the Petitioner, is

factually distinguishable from the present case. In *VanTine*, unlike the present case, a cause of action existed over which the Federal Court would have had original jurisdiction had the case been filed in that court.

III

THE APPELLATE COURT PROPERLY FOUND NO FEDERAL BASIS ON WHICH TO INVOKE JURISDICTION.

While the Petitioner asserts that he could have objected to the removal petition, thereafter filing a third party action pursuant to Rule 14(a), this simply was not done. Petitioner characterizes the ruling of the Appellate Court in determining a lack of Federal jurisdiction as placing from over substance. The Petitioner incorrectly perceives the Appellate Court to have placed misguided emphasis on the impropriety of the removal, when in fact the Appellate Court concluded that there was no Federal jurisdiction, regardless of the removal, owing to the fact that no federal question was presented. In such a case, even though removal was initiated by the party now challenging jurisdiction, Federal jurisdiction cannot be expanded. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

———o———

CONCLUSION

In summation, the Petitioner has neither shown that the issues raised are substantial nor that the decision of the 7th Circuit Court of Appeals is in conflict with the de-

cisions of the other Appellate Courts and the Supreme Court.

For the above and foregoing reasons, the Petition for a Writ of Certiorari should be summarily denied.

Respectfully submitted,

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(309) 788-6301

Attorneys for Respondent,
Uptown National Bank of Moline

APPENDIX

In the Circuit Court for the Fourteenth Judicial Circuit
Rock Island County, Illinois
County Division

No. 83 L 228

Charles Brandt and Henry Brandt
d/b/a Brandt Construction Company, a partnership,

Plaintiffs,

v.

Uptown National Bank of Moline,
a national banking corporation,

Defendant.

COMPLAINT

Count I

(FILED 8/5/83)

NOW COME Charles Brandt and Henry Brandt, d/b/a Brandt Construction Co., a partnership (herein Brandt), plaintiff, by Bozeman, Neighbour, Patton & Noe, its attorneys, and by way of Complaint against Uptown National Bank of Moline, a national banking corporation (herein Uptown) state:

1. That during 1981 Brandt obtained contracts for certain work at the Rock Island Arsenal.

2. That on or about October 5, 1981, Brandt entered into certain subcontracts with DeVolder Brothers Roofing Contractors, Inc. (herein DeVolder) pertaining to the project in question.

3. That on or about October 28, 1982 Brandt made its final payment to DeVolder pertaining to the aforesaid project in the amount of $64,734.56, said check being made payable jointly to DeVolder and Uptown pursuant to previous request of Uptown.

4. That at the time said final payment was made, certain material suppliers including Owens-Corning Fiberglass Corporation (herein Owens-Corning) and W.G. Block Company, were unpaid.

5. That DeVolder advised Uptown that the funds represented by the final payment were needed to pay its suppliers on the Arsenal project.

6. That, despite such knowledge, Uptown applied said funds on an unrelated debt of DeVolder.

7. That as a result of such action by Uptown, amounts due Owens-Corning and W. G. Block Company, materialmen, were not paid and Brandt is now liable to pay claims by said companies, being asserted pursuant to the Miller Act (40 USC Sec. 270b) totaling $58,744.69 plus interest and costs.

8. That the aforesaid action of Uptown was contrary to law.

WHEREFORE, Brandt demands judgment against Uptown in the sum of $58,744.69 plus interest and costs to Owens-Corning and W. G. Block Company plus its costs herein.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

NO. 83-4066 CONSOLIDATED

(Filed Nov. 7, 1983)

The UNITED STATES OF AMERICA for the Use of OWENS-CORNING FIBERGLAS CORPORATION, a corporation,

Plaintiff,

v.

BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt; CHARLES BRANDT, a partner of Brandt Construction Company; HENRY BRANDT, a partner of Brandt Construction Company; and INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

AND

CHARLES BRANDT and HENRY BRANDT, d/b/a BRANDT CONSTRUCTION CO., a partnership,

Plaintiffs,

v.

UPTOWN NATIONAL BANK OF MOLINE, a National Banking Corporation,

Defendant.

AMENDED COMPLAINT

Now come Charles Brandt and Henry Brandt, d/b/a Brandt Construction Co., a partnership, (herein Brandt),

plaintiff, by Bozeman, Neighbour, Patton & Noe, its attorneys, and, pursuant to leave of court, state by way of Amended Complaint against Uptown National Bank of Moline, a national banking corporation (herein Uptown), as follows:

COUNT I

1. That during 1981 Brandt obtained contracts for certain work at the Rock Island Arsenal and posted performance and payment bonds as required by 40 USC Section 270a.

2. That on or about October 5, 1981 Brandt entered into certain subcontracts with DeVolder Brothers Roofing Contractors, Inc. (herein DeVolder) pertaining to the project in question.

3. That on or about October 28, 1982 Brandt made its final payment to DeVolder pertaining to the aforesaid project in the amount of $64,734.56, said check being made payable jointly to DeVolder and Uptown pursuant to previous request of Uptown.

4. That at the time said final payment was made, certain material suppliers including Owens-Corning Fiberglas Corporation (herein Owens-Corning) and W. G. Block Company, were unpaid and Owens-Corning has now filed suit claiming it is entitled to recover $55,537.46 plus interest and costs.

5. That DeVolder advised Uptown that the funds represented by the final payment were needed to pay its suppliers on the Arsenal project.

6. That, despite such knowledge, Uptown applied said funds on an unrelated debt of DeVolder.

7. That as the result of such action by Uptown, amounts due Owens-Corning and W. G. Block Company, materialmen, were not paid and Brandt, as principal under the aforesaid bonds, is potentially liable to pay claims by said companies, being asserted pursuant to the Miller Act (40 USC Sec. 270b) totaling $58,744.69 plus interest and costs.

8. That the aforesaid action of Uptown was contrary to law.

WHEREFORE, Brandt demands judgment against Uptown in the sum of $58,744.69 plus interest and costs or, alternatively, the sums paid to Owens-Corning and W.G. Block Company plus its costs herein.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

No. 83-4073

No. 83-4066

(CONSOLIDATED)

(Filed May 15, 1984)

THE UNITED STATES OF AMERICA for the Use of
OWENS-CORNING FIBERGLAS CORPORATION,
a corporation

Plaintiff,

v.

BRANDT CONSTRUCTION COMPANY,
a partnership, et al.,

Defendants.

and

CHARLES BRANDT, ET AL,

Plaintiffs,

v.

UPTOWN NATIONAL BANK OF MOLINE,
a national banking corporation,

Defendant.

MOTION FOR SUMMARY JUDGMENT

NOW COMES Brandt Construction Company (herein Brandt), a partnership, by Bozeman, Neighbour, Patton & Noe, its attorneys, and moves the court for entry of a sum-

mary judgment against Uptown National Bank of Moline, a corporation (herein Uptown), on Count I of its Complaint herein and in support of said motion states:

1. On or about October 5, 1981 Brandt, general contractor, entered into two subcontracts with DeVolder Brothers Roofing Contractors, Inc. (herein DeVolder) pertaining to repair of two buildings at the Rock Island Arsenal. Copies are attached as Exhibits A and B.

2. Pursuant to requirement of its contracts with the Department of the Army, Brandt posted payment bonds, under which it was the principal, pertaining to said project.

3. Brandt made checks for payment due DeVolder on this project payable jointly to DeVolder and Uptown as per the request of Ralph Schaller, Uptown vice president.

4. On October 28, 1982 Brandt made its final payment to DeVolder pertaining to said project via a check in the amount of $64,734.56 payable jointly to DeVolder and Uptown. A copy is attached as Exhibit C.

5. At the time said payment was made there were certain firms which supplied material for the Arsenal project which had not been paid, including Owens-Corning Fiberglass Corporation (herein Owens-Corning).

6. The final payment from Brandt was in an amount sufficient to fully pay the balance due all firms supplying material in connection with the government project.

7. DeVolder advised Uptown that it was necessary to use the aforesaid final payment to satisfy its obligation to Owens-Corning and other suppliers. See Affidavit of Michael DeVolder attached hereto as Exhibit D.

8. Despite having knowledge that the funds in question were derived from a bonded, government project and that certain suppliers were unpaid, Uptown appropriated said funds and applied the payment on a note of DeVolder payable to Uptown which was wholly unrelated to the government project in question. See transcript of deposition of Ralph H. Schaller, Jr., pages 36-37, attached hereto as Exhibit E.

9. By virtue of Uptown's action, DeVolder was unable to pay Owens-Corning and DeVolder subsequently filed bankruptcy.

10. Owens-Corning filed a claim against Brandt and the surety on its bond pursuant to the provisions of the Miller Act (40 USC, Sec. 270b) and ultimately this court entered judgment against Brandt in connection therewith. (See Judgment Order dated April 3, 1984).

11. Brandt has paid Owens-Corning $59,853.62 in satisfaction of said judgment, including interest and costs, and has obtained a Release and Assignment. A copy attached as Exhibit F.

12. By virtue of the foregoing, Uptown had an obligation to allow the funds in question to be applied on the bonded, government project as opposed to DeVolder's unrelated obligation.

13. As a result of Uptown's conduct as aforesaid, Brandt has piad $59,883.62 in excess of its obligations on the Arsenal project and has been damaged in that amount.

14. The Affidavit of Charles W. Brandt and a Memorandum of Law in support of this motion are attached as Exhibits G and H respectively.

BRANDT CONSTRUCTION CO.,
a partnership

By———/s/ Robert J. Noe———
For: Bozeman, Neighbour, Patton
& Noe
Its Attorneys

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

NO. 83-4066

CONSOLIDATED

The UNITED STATES OF AMERICA, for the Use of OWENS-CORNING FIBERGLAS CORPORATION, a corporation,

Plaintiff,

v.

BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt; CHARLES BRANDT, a partner of Brandt Construction Company; HENRY BRANDT, a partner of Brandt Construction Company; and INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

AND

CHARLES BRANDT and HENRY BRANDT, d/b/a BRANDT CONSTRUCTION CO., a partnership,

Plaintiffs,

v.

UPTOWN NATIONAL BANK OF MOLINE, a National Banking Corporation,

Defendant.

JUDGMENT ORDER

This matter coming on to be heard on the Motion for Summary Judgment of Plaintiff as to damages; the Court having conducted a hearing on Plaintiff's Motion for Sum-

mary Judgment by means of a telephone conference with Robert J. Noe, Attorney for Defendants, BRANDT CONSTRUCTION COMPANY, CHARLES BRANDT, HENRY BRANDT and INSURANCE COMPANY OF NORTH AMERICA, Thomas A. Skorepa, Attorney for Defendant, UPTOWN NATIONAL BANK OF MOLINE, and Thomas W. Montgomery, Attorney for Plaintiff, OWENS-CORNING FIBERGLAS CORPORATION; and the Court being fully advised in the premises.

The Court previously granted Plaintiff's Motion for Summary Judgment on the issue of liability by Order entered by the Court on March 9, 1984.

The Court hereby finds that Defendants have not denied nor disputed, by way of answer or reply, Plaintiff's Request to Admit Facts and Genuineness of Documents, which was served upon Defendants on November 16, 1983, a copy of which is attached to Plaintiff's Motion for Summary Judgment as Exhibit I, and accordingly, the Court hereby finds that all of such facts be and hereby are admitted by Defendants and such documents be and hereby are found to be genuine, in accord with Federal Rule of Civil Procedure 36.

The Court further finds that the defense to Plaintiff's Motion for Summary Judgment offered by Defendants of the Affidavit of CHARLES W. BRANDT, which includes the statement that on November 16, 1982, CHARLES W. BRANDT had a telephone conversation with Robert Munger of OWENS-CORNING FIBERGLAS CORPORATION and was advised by Mr. Munger that the balance on his company's account with DeVolder Brothers, Inc. was $46,000.00, is insufficient grounds to bar entry of summary judgment in favor of Plaintiff as to damages.

The Court hereby further finds that Summary Judgment should be granted to the Plaintiff and against the Defendants, BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt, CHARLES BRANDT, a partner of Brandt Construction Company, HENRY BRANDT, a partner of Brandt Construction Company, and INSURANCE COMPANY OF NORTH AMERICA, on the issue of damages and in the amount of $55,537.46 plus interest thereon at the rate of five per cent (5%) per annum from October 1, 1982, plus costs, as prayed for by Plaintiff in its Complaint.

IT IS HEREBY ORDERED that judgment be and hereby is entered in favor of Plaintiff, UNITED STATES OF AMERICA for the Use of OWENS-CORNING FIBERGLAS CORPORATION, a corporation, and against Defendants, BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt, CHARLES BRANDT, a partner of Brandt Construction Company, HENRY BRANDT, a partner of Brandt Construction Company, and INSURANCE COMPANY OF NORTH AMERICA, in the amount of $55,537.46 plus interest thereon at the rate of five per cent (5%) per annum from October 1, 1982, through March 27, 1984, in the amount of $4,138.67, being a total of $59,676.13 plus costs.

Entered this 3rd day of April, 1984.

/s/ Michael M. Mihm, Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

CASE NO. 83-4066 Judge Michael M. Mihm

THE UNITED STATES OF AMERICA for the Use of OWENS-CORNING FIBERGLAS CORPORATION

v.

BRANDT CONSTRUCTION COMPANY, et al

Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED pursuant to Order filed and entered herein this date, that Plaintiff United States of America for the Use of Owens-Corning Fiberglas Corporation, a corporation's motion for summary judgment is Granted and that judgment be and hereby is entered in favor of Plaintiff, United States of America for the use of Owens-Corning Fiberglas Corporation, a corporation, and against Defendants, Brandt Construction Company, a partnership comprised of Charles Brandt and Henry Brandt, Charles Brandt, a partner of Brandt Construction Company, Henry Brandt, a partner of Brandt Construction Company, and Insurance Company of North America, in the amount of $55,537.46 plus interest thereon at the rate of five per cent (5%) per annum from Octo-

ber 2, 1982, through March 27, 1984, in the amount of $4,138.67, being a total of $59,676.13 plus costs.

/s/ Robert J. Kauffman
Clerk

/s/ Colleen K. Moran
Deputy

April 3, 1984
Date